INDEX

Table of Cases

STATUTES CITED

SUPREME COURT OF THE UNITED STATES

JANUARY TERM, 1948

No. 706

A. N. CONE,

Petitioner,

vs.

WEST VIRGINIA PULP AND PAPER COMPANY,

Respondent

ETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

Your Petitioner, A. N. Cone, respectfully asks this Honable Court to review on Writ of Certiorari the construcon of a previous opinion and mandate of the Supreme ourt of the United States in this case, and the procedure the United States District Court for the Eastern District South Carolina, Charleston Division, at Charleston, outh Carolina, and the United States Circuit Court of ppeals, Fourth Circuit, at Richmond, Virginia, after the inion and mandate of the Supreme Court of the United ates.

The previous opinion of the Supreme Court of the nited States in this case was dated and filed March 3, 47, and is reported in 330 U. S. 212. The opinion and

mandate of the Supreme Court of the United States was filed in the District Court on April 19, 1947. On May 21, 1947, after time for petition for rehearing in the Supreme Court had expired, the plaintiff, A. N. Cone, caused execution to be issued on the original judgment in his favor for $15,000.00, with interest and costs.

On May 3, 1947, the defendant served notice of motion returnable before the Honorable J. Waties Waring, District Judge, Eastern District of South Carolina, Charleston Division, on May 12, 1947, for an order setting aside, cancelling and staying the execution. The defendant also moved before Judge Waring to offset the defendant's costs in the Court of Appeals against the plaintiff's costs in the Supreme Court.

Both motions were heard together on May 12, 1947. The motions to stay execution and offset costs are shown in the appendix hereto at page 31. The order of the District Judge staying execution and offsetting costs is shown in the appendix at page 32.

In due course the plaintiff filed notice of appeal from the order of Judge Waring staying execution and the appeal was duly heard by the United States Circuit Court of Appeals, Fourth Circuit, at Baltimore, Maryland, on November 19, 1947. The Circuit Court of Appeals refused to interpret the opinion and mandate of the Supreme Court of the United States and filed an order dated November 19, 1947, dismissing the appeal as premature. The order of the Circuit Court of Appeals is shown in the appendix at page 35. The plaintiff then, in due course, petitioned the Court of Appeals for a rehearing on December 17, 1947, which petition was denied on December 30, 1947.

The legal questions involved and the reasons relied upon by the petitioner for the allowance of the Writ are as follows:

Point No. 1

The order of the District Judge and the refusal of the Circuit Court of Appeals to adjudicate whether or not the plaintiff has a money judgment resulting from the force and effect of a previous opinion and mandate of the Supreme Court of the United States, denies the plaintiff of his property rights without due process of law.

Your petitioner would respectfully show that the force and effect of the opinion of this Honorable Court reported in 330 U. S. 212, restored his judgment on the verdict. The basic theory is that since the defendant, West Virginia Pulp & Paper Company, on the original appeal to the Court of Appeals, did not bring before that Court for adjudication any matter except error allegedly of the trial judge in refusing defendant's motion for directed verdict, the sole issue in the United States Circuit Court of Appeals was confined to that proposition. The Court of Appeals granted the defendant's request on the original appeal and directed entry of judgment for the defendant. This Court, on certiorari, reversed the Circuit Court of Appeals. By operation of law, when the action of the Court of Appeals setting aside plaintiff's judgment was reversed by this Court, the plaintiff was in the same position as if no appellate action had taken place, to wit: the judgment on the verdict was restored. The order of the District Court staying execution on the plaintiff's judgment and verdict construes the opinion and mandate of the Supreme Court to mean, "in effect", a new trial was ordered.

From this final order of the trial judge interpreting the opinion and mandate of the Supreme Court, your petitioner is entitled to appellate review, either confirming or overruling the construction of the opinion and mandate of this Court, as misinterpreted by the District Judge.

Your petitioner either has a property right in a money judgment entered on the verdict or he has no property right. This presents a judicial question concerning a property right or a claim to a property right of your petitioner to which adjudication he is guaranteed due process by the Constitution of the United States. The Circuit Court of Appeals, Fourth Circuit, by dismissing plaintiff's appeal from the order of the District Judge as premature, denies your petitioner of due process under the constitution.

POINT No. 2

If no motion for a new trial is made and ruled upon by the trial judge under Rule 50(b), does the Circuit Court of Appeals have authority to order a new trial?

Your petitioner would respectfully show that the Circuit Court of Appeals does not have authority to order a new trial under Rule 50(b) unless the trial judge initially passes on such a motion. The order of J. Waties Waring, District Judge for the Eastern District of South Carolina, Charleston Division, dated May 17, 1947, construing the opinion and mandate of this Court automatically affords the defendant a new trial, though it did not appeal from any order of the District Judge refusing a new trial, other than on after discovered evidence. Your petitioner contends that such an interpretation of the opinion of this Court is obviously error.

POINT No. 3

The order of the District Judge staying execution on plaintiff's judgment is contrary to the previous opinion of the Supreme Court and the mandate issued thereunder.

Your petitioner respectfully would show that the essence of this Court's opinion in *Cone* v. *West Virginia Pulp and*

Paper Company, reported in 330 U. S. 212, directly holds that the Court of Appeals may not order a new trial or a judgment for the losing party unless appropriate motions are made for such action before the Trial Judge as permitted under Rule 50(b). The rule does not compel the losing party to make either motion. If he elects not to make either of the motions, he is bound by his own election. The error of the Trial Judge in interpreting the opinion and mandate of this Honorable Court was based on the assumption that dictum in the opinion of the Court of Appeals, with reference to alleged error in the introduction of evidence, was sufficient to send the case back for a new trial. The defendant, West Virginia Pulp and Paper Company did not move before the Trial Judge for a new trial on the grounds of error in the introduction of evidence. The defendant did make a motion for a new trial on other grounds but did not appeal therefrom and such matters were not before the Circuit Court of Appeals on the first appeal. To so misinterpret the opinion and mandate of this Court as to authorize the Circuit Court of Appeals to direct a new trial on grounds outside of the record, from which no appeal was taken, and which had not been initially passed upon by the Trial Judge is contrary to the very heart of the previous decision of this Court in this case.

Your petitioner earnestly prays that a Writ of Certiorari should be granted by this Court in order that your petitioner may not be denied his right to a money judgment without due process of law and that your petitioner shall be afforded his inherent right to have this Court construe its own opinion and mandate.

WHEREFORE, your petitioner prays that a Writ of Certiorari be issued to the United States District Court for the Eastern District of South Carolina, Charleston Division, where the case now stands for second trial, contrary to the Constitutional rights of your petitioner, to the end that the

said cause may be reviewed and determined by this Honorable Court, as provided by law, and that upon review, this Honorable Court do issue an order reversing the order of the Circuit Judge staying execution on the plaintiff's judgment and order, and levying of execution on judgment on the verdict in favor of your petitioner, together with interest and costs as provided by law.

Respectfully submitted,

A. N. Cone,
Petitioner.

H. Wayne Unger,
Walterboro, S. C.,
W. J. McLeod, Jr.,
Walterboro, S. C.,
J. P. Mozingo, III,
Darlington, S. C.,
Attorneys for Petitioner, A. N. Cone.

Walterboro, S. C., March, 20, 1948.

INDEX

BRIEF FOR PETITIONER

Official Report

The order of the Circuit Court of Appeals, Fourth Circuit, dismissing the appeal as premature is shown in the appendix at page 35, and the order of J. Waties Waring, District Judge, staying execution on plaintiff's judgment is shown in the appendix at page 32.

Statement of Grounds of Jurisdiction

The final order of Judge Waring staying execution on plaintiff's judgment was filed in the United States District Court for the Eastern District of South Carolina, Charleston Division, on May 13, 1947. The appeal to the Circuit Court of Appeals, Fourth Circuit, Richmond, Virginia, having been timely filed, was heard at Baltimore, Maryland, and dismissed as premature by order of that court dated November 19, 1947. Petition for rehearing being duly filed was denied by the Circuit Court of Appeals on December 30, 1947.

Jurisdiction of this Court is invoked under Section 347, U. S. C. A., Title 28, Chapter 9, and the revised rules of the Supreme Court, Rule 50 and 59 and cases decided by this Honorable Court thereunder.

Your petitioner respectfully would show that this Court has jurisdiction by certiorari to review the action of the Circuit Court of Appeals in dismissing plaintiff's appeal as premature thereby depriving him of a property interest in a money judgment without due process of law and without interpreting the force and effect of the opinion and mandate of this Honorable Court previously made and done on Writ of Certiorari; and that this Court has au-

thority by certiorari to review the procedure taken by the United States District Court for the Eastern District of South Carolina, Charleston Division, and the United States Circuit Court of Appeals, Fourth Circuit, taking place allegedly pursuant to the opinion and mandate of this Court; this Court also has jurisdiction to review by certiorari the decisions of the District Court and the Court of Appeals rendered contrary to the Federal Rules of Civil Procedure promulgated by this Court.

Statement of Case

In the interest of economy in costs, your petitioner respectfully refers to original record as filed in this Honorable Court on Certiorari in case of *Cone* v. *West Virginia Pulp & Paper Company* (No. 184, October Term 1946). The proceedings and order of the District Court which have taken place since the mandate of the Supreme Court are printed in the appendix to this brief.

This was a case originally of trespass *quare clausum fregit,* in which the plaintiff claimed title to property under recorded deed and plat and payment of taxes for more than twenty years.

At pre trial conference, it was stipulated that both sides were to notify counsel for the other side of any deeds they desired to introduce and that such records could be introduced by certified copy of the record. It was further stipulated at pre trial conference that titles need not be proved beyond the War Between the States, since the records of Dorchester County, S. C., at that time were destroyed. Prior to the trial defendant's counsel served notice on the plaintiff's counsel that the defendant would introduce a typewritten copy of a deed from Adam Miles Cone (plaintiff's grandfather), to Miles Cone (plaintiff's father), dated

September 19, 1888, and plat of the grandfather dated in 1847 (R. 136, Item No. 1).

Plaintiff, after receiving such notice, in his case in chief introduced a certified copy of said deed from Adam Miles Cone to Miles Cone dated September 19, 1888, and plat of the grandfather, Adam Miles Cone, dated in 1847. It was agreed that title records were destroyed in the War Between the States. The defendant objected to the introduction of the said deed and plat (R. 6).

> "Objection by Mr. Waring: I object to the introduction of that deed in evidence because I point out that the description in that deed has no relation to the property at issue in this action and is not the property involved in this action."

On page 7 of the record the plaintiff then identified the land described in that deed and plat as being the property involved in the action.

The defendant then in its case introduced a certified copy of the same deed and plat, as one instrument, of which it had notified the plaintiff prior to trial it would introduce, and being the same deed which it objected to the plaintiff introducing. (R. 68-71, defendant's exhibit No. D-13). The *certified copy* of the deed and plat introduced by the plaintiff showed separate instruments, to wit: a deed, and secondly a plat. The plaintiff, in reply testimony, then introduced the original deed and the original plat to show that they were actually separate documents. The defendant did not object to the introduction of these originals. At the end of the testimony, the defendant moved to strike out the said deed and plat from A. Miles Cone to Miles Cone (R. 42). The motion was refused.

The defendant then moved for a directed verdict on the grounds:

> "The proof deduced by the defendant, we feel substantiates title conclusively in this land in the defendant and not in the plaintiff, as he attempted to show."

and

> "That there has been no showing that the West Va. Pulp and Paper Company did any cutting on this property." (R. 43-44).

After verdict of the jury for the plaintiff, the defendant moved for a new trial;

> "The defendant, West Virginia Pulp & Paper Company, moved for a new trial, stating as grounds for new trial the same points listed *the* the defendant in its motions to dismiss and for a directed verdict."

The defendant subsequently, more than ten days after judgment on the verdict, moved for a new trial on the grounds of after discovered evidence. All motions were denied by the Trial Judge. The defendant did not appeal from the motion for a new trial made after verdict for plaintiff, but appealed from the motion for a new trial on the grounds of after discovered evidence and from the verdict and judgment. (R. 105).

On the first appeal to the United States Circuit Court of Appeals at Richmond, Virginia, that Court reviewed the evidence of the trial to determine whether or not the motion for directed verdict should have been granted. In analyzing the testimony to determine if a verdict should have been directed, the Court of Appeals, by dictum, "interjected" that it was error to permit the introduction of the deed of the father and plat of the grandfather, and intimated that this was sufficient error to send the case back for a

new trial. No new trial was ordered, however, since the point before the Court was to direct verdict which it did. No motion n. o. v. having been made, your petitioner, on certiorari, challenged the authority of the Court of Appeals to so direct verdict.

The Supreme Court of the United States subsequently reversed the Court of Appeals because no motion n. o. v. was made.

The District Judge on defendant's motion to stay execution of a judgment on the verdict construed the opinion and mandate of this Court to, in effect, order a new trial because of error in the introduction of the testimony, to wit: the deed of the father and plat of the grandfather. Subsequently, your petitioner on appeal to the Circuit Court of Appeals sought a review of the interpretation of this Court's opinion by the District Judge but such appeal was dismissed as premature. The Court of Appeals refused to interpret the opinion of this Court and refused to review the procedure of the case on first appeal to the extent that the defendant, on the first appeal, did not bring before that Court any motion for a new trial on the grounds of error in the introduction of the deed and plat. Consequently, the case has been placed on the docket for a second trial in the United States District Court for the Eastern District of South Carolina, Charleston Division, without having a new trial ordered by either the District Court, the Court of Appeals or the Supreme Court of the United States.

ARGUMENT

Point No. 1

The order of the District Judge and the refusal of the Circuit Court of Appeals to adjudicate whether or not the plaintiff has a money judgment resulting from the force and effect of a previous opinion and mandate of the Supreme Court of the United States, denies the plaintiff of his property rights without due process of law.

(a) If your petitioner's position is correct that the effect of the prior procedure in this case under the opinion of this court restored his money judgment on the verdict, such a money judgment is a property right of which he may not be deprived without due process. This would seem so elementary that it needs no citation.

(b) The petitioner respectfully submits that on the first appeal the scope of the decision of the United States Circuit Court of Appeals embraced only the question of whether or not the verdict should have been directed for the defendant. That Court also had before it on the first appeal the question of whether or not a new trial should have been granted on after discovered evidence but did not rule on this question. That these two limited questions formed the basis for *stare decisis* on the first appeal was clearly recognized in the opinion of that Court by Circuit Judge Dobie:

> "On its appeal, the defendant argues that the judgment below should be reversed in consequence of the plaintiff's failure to establish either title or possession and the defendant's establishment of both title and possession, because of prejudicial error in the admission of testimony as to the plaintiff's back title, because of the denial of the motion for a new trial on the basis of after-discovered evidence, and also because of a

contention not previously noted here, namely, that the trespass complained of was not committed by the defendant" (R. 146. *West Virginia Pulp and Paper Co.* v. *Cone,* 153 F. 2d 576.)

The Court of Appeals held as groundless the defendant's contention that there was no proof that the defendant cut the timber or committed the trespass, and directly and solely held,

> "We find that possession" (of the plaintiff), "was not established by any evidence worthy of submission to the jury. The judgment of the court is accordingly reversed with direction to enter judgment for the defendant."

That court did not consider ordering a new trial, and did not order a new trial on the grounds of error in the introduction of the deed and plat. The District Judge, J. Waties Waring, by his order of May 13, 1947, is confused as to the exact issues that were before the Court of Appeals on the First Appeal. Not having clearly in mind that the sole point decided by the appellate court on the first appeal was direction of verdict for the defendant, the District Judge arrived at the erroneous conclusion that the appellate court on the first appeal also was considering the ordering of a new trial. Such issues were not before that Court.

Circuit Judge Dobie, in weighing the evidence of the plaintiff as to title and possession, in order to determine if such issue should have been submitted to the jury, plucked from the scales on behalf of the plaintiff, as to his title, a deed from the plaintiff's grandfather to his father in 1888, and a plat of the grandfather in 1847, and interjected in connection therewith:

> "It may be interjected here that harmful error unquestionably took place in the admission and failure

> to take from the jury of testimony with respect to the plaintiff's purported chain of title prior to the deed of his mother to him." (153 F. 2d, p. 578.)

The District Judge erroneously interpreted the opinion of this Court relative to the disputed testimony as confirming the Court of Appeals holding that such was an error at trial. The opinion of this Court on certiorari was directed solely to the question of power of the Circuit Court of Appeals to direct verdict without a prior motion n. o. v. Your petitioner further submits that when this Court stated:

> "Other questions have been discussed here, but we do not consider them. Consequently, we accept, without approving or disapproving, the Circuit Court of Appeals' holding that there was prejudicial error in the admission of evidence and in the submission of the case to the jury." (67 S. Ct. p. 754.)

that it meant exactly what it said, that it was not affirming or overruling this issue. The narrow issues decided by the Court of Appeals was on directed verdict for the defendant and by this Court reversing such ruling.

(c) The essence of the holding of this Court in its opinion on certiorari was to the effect that the plaintiff was entitled to have the Trial Judge, at the end of the case, pass upon whether or not there should be a new trial on errors at trial, such as the introduction of this testimony, before the appellate court could review the holdings of the Trial Judge. If the defendant had complied with this fundamental doctrine of the Rules of Civil Procedure and had made a motion for new trial on the grounds that the deed and plat were erroneously in the record and such motion was refused by the Trial Judge, appeal could then have been taken to the Court of Appeals to review such action of the Trial Court. No such motion was made on

such grounds and was not reviewed by the the Circuit Court of Appeals on the first appeal.

If such a question had been before that Court and had been reviewed on the first appeal, the plaintiff would have submitted in opposition thereto before the Trial Judge and before the appellate Court, and respectfully submits that that Court would have taken cognizance that the defendant had long since waived any objection to the introduction of such evidence of title for the following reasons:

(1) The said deed of the grandfather, Adam Miles Cone, to the father of the plaintiff, Miles Cone, in 1888, was first interjected into the case by the defendant. Pursuant to agreement of counsel at pre-trial conference, the defendant's counsel served the plaintiff's counsel with a notice, prior to trial, that this identical deed and plat would be introduced by the defendant (R. 136).

(2) Although the defendant objected to the introduction of this deed and plat by the plaintiff in its case in chief, it immediately waived such objections by introducing the same deed and plat in its own case in chief.

(3) The defendant again waived any objections when the plaintiff, in reply testimony, introduced the original deed of Adam Miles Cone to Miles Cone, and the original plat of the grandfather of 1847, without objection by the defendant. The certified typewritten copies of the deed and plat introduced by the plaintiff in chief showed the deed and plat to be two separate instruments. The certified typewritten copy introduced by the defendant (R. 68-71, defendant's Exhibit No. D-13) showed the plat of the grandfather to be a part of the deed to the father and annexed thereto only to describe the property in that deed. The plaintiff then in reply introduced the originals to show the differentiation that the deed of 1888 was a claim of title

including the land in dispute and the plat of 1847 prior to the War Between the States was a claim of title by the grandfather. (Stenographic Record, pages 171-172.)

(4) After verdict for the plaintiff, the defendant before judgment moved for a new trial, but waived any objection (the third time) to the said deed and plat by not listing as grounds for a new trial, error in the introduction of this evidence of title.

> "Where a motion for a new trial is made, exceptions which are not brought forward therein are as a general rule deemed to have been waived, and, therefore, the appellate court will not ordinarily consider trial errors not specified in such motion, or considered, in reviewing the propriety of the overruling thereof, a ground not stated therein. Thus, if exceptions to the admission or exclusion of evidence are not brought forward on the motion for a new trial, they will be deemed waived." (American Jurisprudence 3, Appeal and Error, Section 268, page 45.)
>
> "All matters which are grounds for new trial but are not presented in the motion, or are later abandoned, are deemed to have been waived." (Corpus Juris Sec. Vol. 4, Appeal & Error, Sec. 362, p. 790.)

As a matter of fact, the defendant's notice of appeal did not even appeal from the motion for a new trial made after the verdict and before judgment (R. 105).

(d) As has been previously stated, the error of the District Judge in misconstruing the force and effect of this Court on certiorari was due to his failure to recognize the limited questions before the Court of Appeals on the first appeal. On second appeal from the Order of the District Judge staying the execution of the judgment on verdict, the Court of Appeals in refusing to interpret the opinion of this Court on certiorari and in refusing to give your petitioner appellate review of the limited questions on the

first appeal which were not there raised, has resulted in taking from the plaintiff his judgment on the verdict without due process of law.

> "But due process is not accorded—by a decree of the appellate court on an issue not raised in the trial court—" 12 Corpus Juris, Constitutional Law, p. 1239, Sec. 1015.

Your petitioner, under the previous decisions of this Court, was entitled to have the District Judge rule on a motion for a new trial on the grounds that there was error in the introduction of the deed and plat complained of by the Court of Appeals. This point will now be discussed.

POINT No. 2

If no motion for a new trial is made and ruled upon by the Trial Judge under Rule 50(b) does the Circuit Court of Appeals have authority to order a new trial?

Your petitioner respectfully submits that the Circuit Court of Appeals, Fourth Circuit, at Richmond, Virginia, on the first appeal of this case, could not have remanded the case to the District Court solely on the grounds that there was prejudicial error in the introduction of evidence of title in the plaintiff, to wit: the plat of the grandfather and the deed from the grandfather to the father of the plaintiff. Rule 59(a) of the Rules of Civil Procedure preserves the right of parties to obtain a new trial:

> "(1) In an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States;——"

Sub-section B of Rule 59 provides that a motion for a new trial shall be made not later than ten days after entry of judgment.

Rule 50(b) provides that a motion for new trial in writing setting forth grounds for a new trial may be joined with a motion for judgment notwithstanding the verdict or in the alternative, and cloaks the District Judge with authority in that ten day period to:

> "Allow the judgment to stand or reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed."

These two rules must, therefore, necessarily be construed together since they permit a party to make either or both motions in the alternative. The clear language of Rule 59, as well as Rule 50, does not compel the losing party to make either a motion for a new trial or any motion n. o. v. He is permitted to do either. The point was raised on the first appeal and on certiorari to this Court that the defendant did not exercise his right to make a motion n. o. v. and, therefore, this Court held the appellate court had no authority to direct judgment in the absence of the motion. In logic, the corollary is also true that where the losing party makes no motion for a new trial, the appellate court can not order a new trial.

This Court, by opinion by Justice Roberts, in the case of *Montgomery Ward & Co.* v. *Duncan*, 61 S. Ct. 189, 311 U. S. 243, recognized that a motion for a new trial (on grounds for which new trials may be granted) must be made. This Court laid down the rule which has been in effect from time immemorial and is continued in the Rules of Civil Procedure, of the functions of motion for a new trial and motion for judgment n.o.v.

> "The motion for a new trial assigned grounds not appropriate to be considered in connection with the motion for judgment. It put forward claims that the verdict was against the weight of the evidence and was

> excessive; *that the court erred in rulings on evidence* and in refusing requested instructions. An affirmative finding with respect to any of these claims would have required a new trial whereas none of them could be considered in connection with the motion for judgment." (*Supra*, p. 193.)

As was previously pointed out, the Court of Appeals on the first appeal did not have before it any motion for a new trial on grounds that the trial court erred in ruling on evidence. No such motion was made after verdict; the Trial Judge did not rule on such a motion on such grounds and there was no appeal taken from any such proposition of law.

In the case, this Court clearly laid down the office and function of the two motions under Rule 50(b) of the Rules of Civil Procedure. Mr. Justice Roberts stated:

> "Each motion, as the rule recognizes, has its own office. The motion for judgment cannot be granted unless, as matter of law, the opponent of the movant failed to make a case and, therefore, the verdict in movant's favor should have been directed. The motion for a new trial may invoke the discretion of the court in so far as it is bottomed on the claim that the verdict is against the weight of the evidence, that the damages are excessive, or that, for other reasons, the trial was not fair to the party moving; and may raise questions of law arising out of alleged substantial errors in admission or rejection of evidence or instructions to the jury." (*Supra*, P. 194.)

This Court further held:

> *"The rule contemplates that either party to the action is entitled to the trial judge's decision on both motions, if both are presented."*

Had the defendant made a motion for a new trial, before the Trial Judge, on the grounds of error in rulings on the

evidence of title, your petitioner would have had the clear right to have the Trial Judge initially rule on this question of law. The effect of the misinterpretation of this Court's opinion on certiorari gives to the defendant, West Virginia Pulp & Paper Company, a new trial without it having made a motion for a new trial on such grounds, within the ten days required by the rule. This also denies your petitioner his right to have such motion passed upon by the District Court within the ten days after verdict. The effect of the refusal of the Court of Appeals on the second appeal to hear and decide whether or not your petitioner was denied this right, under the Rules of Civil Procedure, likewise denies this due process guaranteed him under the Constitution and the decisions of this Court.

> "The rule contemplates that either party to the action is entitled to the trial judge's decision on both motions, if both are presented. A decision in favor of the moving party upon the motion for judgment ends the litigation and often makes it possible for an appellate court to dispose of the case without remanding it for a new trial. If, however, as in the present instance, the trial court erred in granting the motion the party against whom the verdict went is entitled to have his motion for a new trial considered in respect of asserted substantial trial errors and matters appealing to the discretion of the judge. In this case the reasons assigned in support of the motion for a new trial were in both categories. The grounds assigned for a new trial have not been considered by the court." *Montgomery Ward & Co.* v. *Duncan,* 61 S. Ct. 189, 311 U. S. 243.

In this case, the grounds assigned for new trial have not been considered by the trial court within the ten days commanded by the rule. If such grounds and such motion had been presented to the Trial Judge, he indicates in his order of May 13, 1947, that he would have overruled such a motion.

> "The fact that I believe the case properly went to the jury has no effect since I am controlled by the opinion of the Circuit Court of Appeals."

Your petitioner respectfully submits that the District Court at this late date is not controlled by the opinion of the Circuit Court of Appeals as to alleged error in the introduction of evidence for such matters were not raised by proper motion for new trial within the ten days after verdict as prescribed by Rules 50 and 59.

In the *Montgomery Ward* case, this Court pointed out that if both motions were made and ruled upon by the trial court within the ten days, then the appellate court is in position to reverse either or both rulings of the trial court and order a new trial or enter judgment.

> "If alternative prayers or motions are presented, as here, we hold that the trial judge should rule on the motion for judgment. Whatever his ruling thereon, he should also rule on the motion for new trial, indicating the grounds of his decision. If he denies a judgment n.o.v. and also denies a new trial, the judgment on the verdict stands and the losing party may appeal from the judgment entered upon it assigning as errors both the refusal of judgment n.o.v. and errors of law in the trial as heretofore. The appellate court may reverse the former action and enter judgment n.o.v., or it may reverse and remand for a new trial for errors at law." (*Supra* P. 195.)

In that case, this Honorable Court reversed and remanded to the District Court to hear and rule on a motion for a new trial, grounded on alleged errors in the introduction of evidence. Obviously in this case, where no motion on such grounds was made, the opinion and mandate of this Court on certiorari could not and did not remand to the District Court to hear and determine such an issue which was never raised.

POINT No. 3

The order of the District Judge staying execution on plaintiff's judgment is contrary to the previous opinion of this Court on certiorari and the mandate issued thereunder.

The essence of this Court's opinion on certiorari was that the plaintiff, A. N. Cone, was entitled to have the trial court initially determine the issue of a new trial so that:

> "He can exercise this discretion with a fresh, personal knowledge of the issues involved and the kind of evidence given and the impression made by witnesses. *His appraisal of the bona fides of the claims asserted by the litigants is of great value in reaching a conclusion as to whether a new trial should be granted.* Determination of whether a new trial should be granted or judgment entered under Rule 50B calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case, which no appellate printed transcript can impart."
>
> "Exercise of this discretion presents to the trial judge an opportunity, after all his rulings have been made, and all evidence has been evaluated, to view the proceedings in a perspective peculiarly available to him alone. He is thus afforded a last chance to correct his own errors without delay, expense or other hardships of an appeal." 67 S. Ct. P. 755.

Although this is the heart of the decision of this Court on certiorari, the Honorable J. Waties Waring, by his misinterpretation of this Court's opinion gives to the defendant a new trial without having such issue initially determined by the Trial Judge within ten days after verdict, while the case was still fresh in his mind. Further, it grants the defendant a new trial contrary to the opinion of

this Court, and despite the fact that the Trial Judge, after more than two years from verdict, still feels that the case properly went to the jury with the evidence as introduced.

It seems patent that since the defendant did not move before the Trial Judge within ten days after verdict for a new trial on the grounds that the Court erred in permitting the introduction of the deed and plat of the grandfather and the father, and such issue was not passed upon initially by the Trial Judge, while the issues were fresh in his mind, and that no appeal was taken from the failure to grant a new trial on any grounds other than after discovered evidence, and that the evidence complained of and used as a basis for invoking a new trial was first interjected into the case by the defendant, waived by him by his later introduction of the evidence and his failure to object to the introduction of the original deed and plat by the plaintiff in reply, that the whole force and effect of the opinion of this Court on certiorari has been violated and misinterpreted. The great principles of Federal Procedure reserved for your petitioner by this Court's action on certiorari have become a mockery unless this Court grants this certiorari and corrects the misinterpretation of its opinion.

This Court has recently, in the case of *Globe Liquor Co., Inc.*, v. *Frank San Roman, et al.*, confirmed its views and interpreted its previous opinion in this case to mean that such issues of ruling on evidence should be initially decided by the trial court. If such issues are to be decided by the trial court, Rule 59 states that they are to be decided on proper motion made within ten days after verdict. How then can the defendant be permitted to benefit by his own failure to move within the ten day period for a new trial on the grounds of error in the introduction of testimony, which he waived time and time again at the trial, and which

objections he waived by failing to appeal on any grounds for a new trial other than grounds of after discovered evidence?

The scope and effect of the opinion of this Court on certiorari and the point of law raised in the Court of Appeals on the first appeal relating to error in the introduction of evidence has not heretofore been brought before this Court or before the Court of Appeals. This constrained interpretation of this Court's opinion on certiorari and the proceedings on the first appeal relative to a new trial were not raised until after this Court remanded the case to the District Court. These points cannot be decided on appeal after a second trial of the case. If your petitioner's claims are true and well founded in law, the action is at an end and the judgment entered on the verdict is in effect and he is entitled to execution. To proceed with a second trial without an adjudication of these legal issues, arising since certiorari, would deny your petitioner of his right to an adjudication on his claim and property rights in the original money judgment. On certiorari to this Court, it was argued by the defendant that a motion for new trial could be initially made in the Court of Appeals and "that that Court could therefore remand the question to the District Court to pass upon it." This Court stated:

> "Such a circuitous method of determining the question could not be approved for Rule 50(b) specifically prescribed a period of ten days for making a motion—. Yet the method here suggested would enable litigants to extend indefinitely the prescribed ten day period simply by adoption of the expedient of an appeal. Furthermore, it would present the question initially to the appellate court when the primary discretionary responsibility for its decision rests on the District Court."

Obviously, under the ruling of Judge Waring, interpreting this Court's opinion, the question of a new trial on error in the introduction of testimony has in effect been initially raised in the appellate court when the primary discretionary responsibility for its decision rests on the District Court. The ten day period after verdict, for such motion, has expired by more than two years. This is directly contrary to the language of this Court's opinion.

Your petitioner's position in this respect is also the views taken by the Honorable Circuit Judges, Swan, Chase and Clark, of the Second Circuit Court of Appeals in construing the *Montgomery Ward* case and the *Cone* decision. In the case of *Estelle Binder* v. *The Commercial Traveler's Mutual Accident Association of America* (unreported as yet), Docket No. 20734, decided Jan. 16, 1948, on rehearing Circuit Judge Clark stated:

> "Should the trial judge enter judgment n. o. v. and, in the alternative grant a new trial *on any of the grounds assigned therefor,* his disposition of the motion for a new trial would not ordinarily be reviewable, and only his action in entering judgment would be ground of appeal. If the judgment were reversed, the case, on remand, would be governed by the trial judge's award of a new trial." (Citing Montgomery Ward and other cases.)
>
> "Recent developments fortify the general conclusion here stated. For the Advisory Committee, attempting to codify the results reached by some of the intermediate courts, recommended an amendment to Rule 50(b), F. R. C. P., to make clear the power of the appellate court to act in this and other instances. Report, June, 1946, Rule 50(b), pages 61-63, with Committee Note, pages 64-66. But this was one of the three proposed amendments which the Court did not adopt. Order Dec. 27, 1946, 329 U. S. 843; cf. H. R. Doc. No. 473, 80th Cong., 1st Sess., page 105. The view of the

Court was later explained in the case of Cone *v.* West Virginia Pulp & Paper Co., 330 U. S. 212, reversing a direction of judgment by an appellate court, West Virginia Pulp & Paper Co. *v.* Cone, 4 Cir., 153 F. 2d, 576, because no motion for judgment notwithstanding the verdict had been made. In so deciding, the Court pointed out that the trial judge would have discretion to decide whether a new trial or a judgment notwithstanding the verdict should be ordered, and declined to sanction a course interfering with his 'primary discretionary responsibility.' Finally, in Globe Liquor Co. *v.* Roman, S. Ct., Jan. 5, 1948, the Court again reiterated its regard for this discretionary power of the trial judge and modified a direction for judgment by the circuit court of appeals to provide instead for a new trial where the successful appellant had failed to move below to set aside a directed verdict."

"Hence we cannot interfere with the judge's discretionary power in ordering a new trial."

WHEREFORE, your petitioner respectfully submits that this Court is the arbiter of its own decisions and that in equity and good conscience this Court should issue a Writ of Certiorari in order to give your petitioner relief from the misconstruction of the opinion and mandate of this Court. Although your Petitioner is a small farmer from the destitute low lands of eastern South Carolina, the principles involved in this petition are of national importance. If the District Courts and the Courts of Appeal of the United States are permitted to review and re-mold issues tried by jury without due process and legal procedure under the Federal Rules of Civil Procedure, property rights in these United States will be lost by others than your petitioner. The settled principles of Federal Procedure are designed to preserve and protect the constitutional rights of the rich and the poor, the humble and the great alike.

Your petitioner respectfully submits that the order of the District Court, misinterpreting the opinion and mandate of this Court, should be reversed.

Respectfully submitted,

A. N. CONE,
Petitioner.

H. WAYNE UNGER,
Walterboro, S. C.,

W. J. MCLEOD, JR.,
Walterboro, S. C.,

J. P. MOZINGO, III,
Darlington, S. C.,

Attorneys for the Petitioner, A. N. Cone.

Walterboro, S. C., March 20, 1948.

APPENDIX

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA, CHARLESTON DIVISION

Civil Action No. 1227

A. N. Cone, Plaintiff,

vs.

West Virginia Pulp and Paper Company, Defendant

Motion to Set Off Judgment for Costs

To H. Wayne Unger, J. P. Mozingo, and W. J. McLeod, Jr., Esquires, Attorneys for Plaintiff:

You will please take notice that defendant will move before Honorable J. Waties Waring, United States District Judge, at his chambers in the Postoffice Building in Charleston, S. C., on the 12th day of May, 1947, at 11:00 o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an appropriate order setting off the judgment in favor of defendant for costs in the sum of $676.10, filed and entered in this cause on the 1st day of April, 1946, pursuant to the mandate of the United States Circuit Court of Appeals for the Fourth Circuit, together with lawful interest thereon, against the judgment for costs in favor of plaintiff, in the sum of $700.79, with lawful interest thereon, entered or to be entered in this cause pursuant to the mandate of the Supreme Court of the United States, in satisfaction thereof, pro tanto; said order to provide that upon the payment by defendant of the difference between the two judgments that both of said judgments shall be satisfied of record.

(S.) D. A. Brockington,
(S.) Charles W. Waring,
Charleston, S. C.,

(S.) Christie Benet,
Columbia, S. C.,
Attorneys for Defendant.

April 24, 1947.

STATE OF SOUTH CAROLINA,
County of Charleston, ss:

PERSONALLY appeared before me Charles W. Waring who being duly sworn, says that he is one of the Attorneys for the Defendant, West Virginia Pulp and Paper Company, in the within entitled cause; that Deponent on the 25th day of April, 1947, deposited in the United States Post Office in Charleston, South Carolina, an envelope containing the requisite amount of postage and addressed to H. Wayne Unger, Esquire, Attorney at Law, Walterboro, South Carolina; and that the said envelope contained a carbon copy of the within Motion to Set Off Judgment for Costs.

CHARLES W. WARING,

Sworn to before me this 25th day of April, 1947.

WILLIE JANE OLIVER,
Notary Public for South Carolina. (*Seal.*)

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA, CHARLESTON DIVISION

Civil Action No. 1227

A. N. CONE, Plaintiff,

vs.

WEST VIRGINIA PULP and PAPER COMPANY, Defendant

Notice of Motion

To Messrs. Jefferies, McLeod and Unger, and J. P. Mozingo, III, Esquire, Attorneys for Plaintiff:

You Will Please Take Notice that the Defendant will move before the Honorable J. Waties Waring, United States District Judge at his Chambers in the Post Office Building in Charleston, South Carolina, on the 12th day of May, 1947, at 11:00 o'clock in the forenoon, or as soon thereafter as Counsel can be heard, for an appropriate Order setting aside and cancelling and staying all proceedings upon a certain execution dated the 2nd day of May, 1947, whereby

the United States Marshal of the District Court of the United States for the Eastern District of South Carolina, or his lawful Deputies, were commanded to proceed against the property of the Defendant for the satisfaction of a certain judgment rendered in favor of the Plaintiff against the Defendant on the 5th day of June, 1945, in the above entitled cause in the sum of Fifteen Thousand ($15,000.00) Dollars, with interest thereon from May 22, 1945, at the rate of six per cent (6%) per annum, together with Eighty-seven and 70/100 ($87.70) Dollars costs, upon the ground that the said judgment was reversed and set aside by an Order of this Court dated April 1, 1946, pursuant to the Mandate of the United States Circuit Court of Appeals, Fourth Circuit, and no subsequent proceedings have been had in this Court in connection with this cause pursuant to the Mandate of the Supreme Court of the United States dated the 17th day of April, 1947.

(S.) D. A. Brockington,
Charles W. Waring,
Charleston, S. C.,

Christie Benet, *per C.W.W.,*
Columbia, S. C.,
Attorneys for Defendant.

May 3, 1947.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA, CHARLESTON DIVISION

Civil Action No. 1227

A. N. Cone, Plaintiff,

vs.

West Virginia Pulp and Paper Company, Defendant

At the May, 1945, Term the above cause came on for a trial before a jury and resulted in a verdict for the plaintiff of $15,000.00. The defendant appealed the case to the

Circuit Court of Appeals for the Fourth Circuit and that court reversed the decision of the District Court (153 Fed. 2d, 576), holding that certain testimony had been improperly admitted and that there was not sufficient evidence on which to base a verdict. Instead of remanding the case for a new trial, the Circuit Court of Appeals "reversed with direction to enter judgment for the defendant."

The plaintiff petitioned, and was granted a writ of certiorari by the Supreme Court of the United States and that court reversed the order of the Circuit Court of Appeals by Opinion filed March 3, 1947, —— U. S., ——. In the Opinion of the Supreme Court, it is stated that the holding of the Circuit Court of Appeals that there was prejudicial error in the admission of evidence and submission of the case to the jury was accepted without approving or disapproving of the same; and the question decided was limited solely to the power of the Circuit Court of Appeals to direct the entry of judgment for the defendant where there had been a failure to make a motion in the District Court for judgment notwithstanding the verdict as permitted in Rule 50(b) of the Federal Rules of Civil Procedure.

The plaintiff issued execution directed to the Marshal, based upon the belief that the action of the Supreme Court had affirmed the verdict and judgment. The defendant appears by motion to set aside, cancel and stay the execution. After hearing full argument of the matter, I am of the opinion that this motion should be granted. The effect of the appeals seems to be that the views of the Circuit Court of Appeals as to the impropriety of the admission of evidence and the failure of sufficient proof will prevail; but that the Circuit Court of Appeals, instead of ordering a new trial, erred in directing entry of judgment for the defendant. I cannot avoid the conclusion that the practical effect of these two decisions, one by the intermediate appellate court, and the other by the Supreme Court, is that the judgment obtained in the District Court is set aside and the case is here for a new trial. It is, therefore, improper to issue execution, and I am of the opinion that a new trial must be had in the light of these decisions.

The fact that I believe the case properly went to the jury has no effect since I am controlled by the Opinion of the Circuit Court of Appeals.

The defendant also served a motion which was heard today in the matter of costs. Its position is that it prevailed in the Circuit Court of Appeals and should be allowed to tax its costs against the plaintiff, although it admits that the taxable costs in the Supreme Court are to be charged against it, the defendant. In other words, it prays that it be allowed to offset its costs in the Circuit Court of Appeals since it really prevailed there and the Supreme Court's Opinion is based only upon matters of procedure and proper remedy and does not reverse the case on its merits. I think this position is well taken and the defendant, West Virginia Pulp and Paper Company, will be allowed to tax its costs in the appellate proceedings in the Circuit Court of Appeals and these will be offset against the costs taxed by the plaintiff in the proceedings in the Supreme Court. These amounts of costs will of course, be limited to the appellate proceedings and the matter of costs in the District Court will be left for the final disposition of the case. Accordingly, it is

Ordered that the motion to set aside, cancel and stay the execution hereinabove referred to be and the same is hereby granted. It is

Further Ordered that leave be granted to tax and offset costs in accordance with the above set forth views.

J. Waties Waring,
United States District Judge.

Charleston, S. C., May 13, 1947.

A True Copy, Attest.

Ernest L. Allen,
Clerk of U. S. District Court,
East. Dist. So. Carolina.
(Seal.)

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 5678

A. N. Cone, *Appellant*,

vs.

West Virginia Pulp & Paper Company, a Corporation, *Appellee*

Appeal from the District Court of the United States for the Eastern District of South Carolina, at Charleston

This Cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of South Carolina, and was argued by counsel in behalf of the appellant—counsel for the appellee indicating that they did not desire to make oral argument.

On Consideration Whereof, and it appearing that the order appealed from is not a final order and that the appeal is fragmentary and premature,

It Is Now Here Ordered that the appeal in this cause be, and the same is hereby, dismissed with costs.

Further Ordered that a certified copy of this order be forthwith transmitted to the Clerk of the District Court of the United States for the Eastern District of South Carolina, at Charleston.

November 18th, 1947.

John J. Parker,
Senior Circuit Judge.

A true copy, Teste:

Claude M. Dean,
Clerk, U. S. Circuit Court of Appeals, Fourth Circuit.

UNITED STATES CIRCUIT COURT OF APPEALS,
FOURTH CIRCUIT

No. 5678

A. N. Cone, *Appellant*,

vs.

West Virginia Pulp & Paper Company, a Corporation,
Appellee

Appeal from the District Court of the United States for the Eastern District of South Carolina, at Charleston

This Court having at its November term, 1947, rendered its decision dismissing the appeal in the above entitled cause, and the appellant having on December 17, 1947, presented to the Court a petition for a rehearing of the said cause, and the same having been carefully considered,

It Is Now Here Ordered By This Court that the rehearing asked for, be, and the same is hereby, denied.

John J. Parker,
Senior Circuit Judge.
Morris A. Soper,
U. S. Circuit Judge.
Armistead M. Dobie,
U. S. Circuit Judge.

Endorsed: "Filed and Entered December 30, 1947. Claude M. Dean, Clerk, U. S. Circuit Court of Appeals, Fourth Circuit."

A true copy, Teste:

Claude M. Dean,
Clerk, U. S. Circuit Court of Appeals, Fourth Circuit.

Supreme Court of the United States

OCTOBER TERM, 1947

No. 706

A. N. CONE, PETITIONER,

versus

WEST VIRGINIA PULP AND PAPER COMPANY,
RESPONDENT

BRIEF IN OPPOSITION TO CERTIORARI

CHRISTIE BENET,
J. B. S. LYLES,
Columbia, S. C.,

D. A. BROCKINTON,
CHARLES W. WARING,
Charleston, S. C.

Attorneys for Respondent,
West Virginia Pulp and
Paper Company.

The R. L. Bryan Company, Legal Printers, Columbia, S. C.

INDEX

TABLE OF CASES

Supreme Court of the United States

OCTOBER TERM, 1947

No. 706

A. N. CONE, PETITIONER,

versus

WEST VIRGINIA PULP AND PAPER COMPANY,
RESPONDENT

BRIEF IN OPPOSITION TO CERTIORARI

I. This Court has already denied a motion to recall and amend the mandate in this case, 331 U. S. 794, 91 L. Ed. 1822.

On page 26 of petitioner's brief this statement appears "The scope and effect of the opinion of this Court on certiorari • • • has not heretofore been brought before this Court or before the Court of Appeals." On May 21, 1947, plaintiff-petitioner served notice of his motion whereby this Court was asked to recall and amend its mandate. This motion was made a part of the record on the second appeal to the court below, review of which is hereby petitioned for, by paragraph three of the stipulation of counsel.

This Court was requested by the motion to:

1. Issue a memorandum opinion holding in effect that the Court of Appeals was without jurisdiction on the first appeal because defendant had not made a motion for a new trial following the trial in the District Court, as required by Rule 50(b)—(Grounds 1 and 5 of motion);

2. Require the District Court to issue execution on the original judgment in favor of plaintiff—(Ground 2); and

3. Direct the District Court to levy execution against defendant for plaintiff's costs in the Supreme Court without regard to any offset of costs awarded defendant in the Court of Appeals (Ground 3).

In other words, the motion was based on the theory that this Court had ordered the original judgment of the District Court in favor of plaintiff reinstated. The motion covered both points decided by Judge Waring in the District Court in the order from which the second appeal was taken (R., 18), on the theory advanced by plaintiff, to wit, that the Court of Appeals was without jurisdiction on the original appeal because defendant had not made a motion for a new trial following the verdict in the District Court, when (as plaintiff contended on the motion) this was required by Rule 50(b).

The allegation of the motion that defendant had failed to make a motion for a new trial following the trial in the District Court, was shown by defendant to be *contra* the fact by a certificate of the clerk of the District Court dated May 23, 1947, and by an order of Judge Waring dated December 3, 1945, which were attached to defendant's brief in opposition to the motion as Exhibits "B" and "C" respectively; see R., 24.

The motion to recall and amend was supported by a printed brief of some fourteen pages, whereby this Court

was urged to grant all grounds of the motion. The motion was denied June 16, 1947, in the following words: "The motion to recall and amend the mandate is denied." 331 U. S. 794, 91 L. Ed. 1822. The Court is respectfully referred to respondent's brief in opposition to the motion for pertinent authorities as to the proper construction of the mandate.

The brief for petitioner-appellant on the second appeal, in effect asked the Court of Appeals to make a like ruling as to the construction and effect of the mandate of this Court. But the brief of respondent-appellee pointed out that this was not a new issue arising in the District Court that was outside of the scope of the mandate of this Court, so that the Court of Appeals had no jurisdiction of such a question, citing *Ohio Oil Co. v. Thompson* (C. C. A. 8), 120 F. (2) 831, Cert. Den. 314 U. S. 658.

II. A motion for a new trial is not a condition precedent to the taking of an appeal under federal procedure.

Petitioner now concedes that a motion for a new trial was made by respondent as defendant in the District Court (since we had shown by the record that this was so), but argues that the grounds on which the Court of Appeals reversed the judgment of the District Court on the first appeal were not set forth in that motion for a new trial and that, as a consequence, the Court of Appeals was without jurisdiction to reverse on these grounds.

In our brief in opposition to the motion we cited the following cases in support of the proposition that such a new trial rule does not exist in federal procedure and that the Conformity Act does not apply to such a rule: *Aaron v. U. S.* (C. C. A. 8), 155 F. 833, 838; *Boatmen's Bank v. Trower Bros. Co.* (C. C. A. 8), 181 F. 804, 806; *Chicago Life Ins. Co. v. Tierman* (C. C. A. 8), 263 F. 325, 330.

We have since found the following additional authorities supporting those citations: In the article on "Federal Courts" in 36 C J. S., 265, it is said: "While a contrary rule prevails in some jurisdictions under state practice, as appears in Appeal and Error, Sections 352-388, a motion for a new trial is not a condition precedent to the taking of an appeal under the federal practice." *Chicago Life Ins. Co. v. Tiernan, supra,* is cited in support thereof, and also *American Distilling Co. v. Wisconsin Liquor Co.* (C. C. A. 7), 104 F. (2d), 582, 589, wherein the Court says: "As to defendant's second procedural point it is sufficient to say that a motion for a new trial is not a condition precedent to the taking of an appeal under federal procedure in Federal Courts."

III. Petitioner has waived any right to complain as to offset of costs.

The record of the clerk of the District Court shows that counsel for petitioner accepted and endorsed the clerk's check for $162.04, representing the balance due plaintiff after the offset of costs, and that the check was cashed prior to September 30, 1947. R., 27-30.

Respectfully submitted,

CHRISTIE BENET,
J. B. S. LYLES,
Columbia, S. C.,
D. A. BROCKINTON,
CHARLES W. WARING,
Charleston, S. C.,
Attorneys for Respondent,
West Virginia Pulp and
Paper Company.